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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15

16 UNITED STATES OF AMERICA,  
17 Plaintiff,  
18 vs.  
19 CHARLES CATHCART, et al.,  
20 Defendants.

21 Case No. C-07-4762-PJH

22 **ROBERT J. NAGY'S REPLY TO  
23 UNITED STATES' OPPOSITION TO  
24 HIS MOTION TO STAY THE  
25 PROCEEDINGS OR IN THE  
26 ALTERNATIVE TO SEVER ALL  
CLAIMS AND TRANSFER VENUE  
PURSUANT TO 28 U.S.C. 1404(a)**

27 Date: September 10, 2008  
28 Time: 9:00 a.m.  
29 Dept.: Room 3, 17<sup>th</sup> Floor

30 Trial: March 23, 2009

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1 **I. INTRODUCTION**

2 In its Opposition the United States overlooks several key facts that implicate Mr.  
 3 Nagy's Seventh Amendment right to a jury trial and warrant a stay of the proceedings to  
 4 preserve that right. The United States continues to ignore the fact that *it caused the*  
 5 *present predicament* insofar as the Internal Revenue Service first directed the Attorney  
 6 General to initiate the present action and then for months delayed assessing penalties  
 7 against Mr. Nagy for the same conduct, and then also delayed acting on Mr. Nagy's refund  
 8 requests. The United States, moreover, is involved in both the injunction and refund  
 9 actions because *the parties to both actions are identical*. Additionally, there has been *no*  
 10 *final adjudication* of the present action. Mr. Nagy *has acted to preserve his right to a jury*  
 11 *trial* by bringing this Motion as soon as possible after filing his refund litigation.  
 12 Furthermore, the position advocated by the United States would allow it to *systematically*  
 13 *circumvent the Seventh Amendment* by filing an equitable action first and delaying the  
 14 grounds for a legal action. These circumstances call for application of *Beacon Theatres*  
 15 and a stay of the proceedings or, in the alternative, severing and transferring all claims  
 16 against Mr. Nagy to the District of South Carolina.

17 **II. PURSUANT TO BEACON THEATRES MR. NAGY'S SEVENTH AMENDMENT  
 18 RIGHT TO A JURY TRIAL IS THE CENTRAL ISSUE BEFORE THE COURT  
 19 AND IT IS NECESSARY TO STAY THE PROCEEDINGS TO PRESERVE IT**20 **A. *Beacon Theatres* Controls the Present Circumstances**

21 The United States argues that Mr. Nagy's Seventh Amendment right to a jury trial  
 22 on the issue of whether his alleged conduct violated 26. U.S.C. 6700 is not implicated by  
 23 its dual attack on him pursuant to *Parklane Hosiery Co. v. Shore* ("*Parklane*"). It ignores  
 24 the clear distinctions between that case and the present matter, as well as the similarities  
 25 between the present matter and *Beacon Theatres, Inc. v. Westover* ("*Beacon Theatres*").  
 26 The present case is in fact more like *Beacon Theatres* than it is like *Parklane*, and the  
 former controls whether through direct application or through extension.

1       In *Parklane* a group of shareholders brought a class action against the petitioner  
 2 based a materially false proxy statement. 439 U.S. 322, 324 (1979). In a separate action  
 3 the Securities and Exchange Commission (“SEC”) requested injunctive relief against  
 4 Parklane based on the same proxy statement. *Id.* The SEC action was adjudicated first,  
 5 with the court finding that the proxy statement was materially false and issuing the  
 6 injunction. *Id.* at 325. Subsequently plaintiffs in the class action moved for partial  
 7 summary judgment, arguing that Parklane was collaterally estopped from relitigating the  
 8 issue of whether the proxy statement was materially false. *Id.*

9       Parklane argued that its Seventh Amendment right to a jury trial would be violated  
 10 if it were collaterally estopped from litigating this issue in the class action. *Id.* at 335. It  
 11 argued that it could not have been collaterally estopped in 1791, when the Seventh  
 12 Amendment was adopted, and therefore that collaterally estopping it would violate its right  
 13 to a jury trial as it existed at the time of the adoption of that right. *Id.* The Supreme Court  
 14 reasoned, however, that the Seventh Amendment was not intended to arrest all subsequent  
 15 procedural developments. *Id.* at 336. It held that application of collateral estoppel in that  
 16 case was “not repugnant to the Seventh Amendment simply for the reason that [non-  
 17 mutual collateral estoppel] did not exist in 1791.” *Id.* at 337.

18       In *Beacon Theatres* a movie theater owner (Fox) sued a competitor (Beacon  
 19 Theatres) seeking a declaration that its agreements with distributors for exclusive rights to  
 20 first-run movies did not violate antitrust laws and an injunction against Beacon Theatres.  
 21 359 U.S. 500, 502 (1959). Beacon Theatres counter-claimed against Fox seeking treble  
 22 damages for antitrust violations and demanding a jury trial. *Id.* at 503. The district court  
 23 ordered that the issues in the original complaint be tried to it before a jury determination of  
 24 the counterclaims. *Id.* at 503-504. But there were common issues amongst the various  
 25 claims. *Id.* at 504. Beacon Theatres therefore sought a mandamus to require the district  
 26 court to grant its request for a jury trial on Seventh Amendment grounds. *Id.* at 501.

1       The Supreme Court reasoned that a determination by the district court of the  
 2 common issues could operate by way of collateral estoppel or *res judicata* to prevent a jury  
 3 determination of those issues. *Id.* at 504. It ruled that such a result was impermissible  
 4 under the Seventh Amendment. *Id.* at 508-510. In doing so it held open the possibility  
 5 that there may be a circumstance where equitable and legal claims clash such that trying  
 6 the legal issue to a jury first may irreparably harm the party seeking equitable relief, and  
 7 trying the equitable issue to the court first would deprive the party seeking relief at law of  
 8 its right to a jury trial. *Id.* at 510. In such a case the Court did *not* say the say the equitable  
 9 issue should typically be tried to the court first. *Id.* Rather, the Court stated that the trial  
 10 court will have to use its discretion to decide which issue to try first in such a case. *Id.* It  
 11 further stated, however, that because the right to a jury trial is a *constitutional* right,  
 12 whereas trial by the court is not, “that discretion is *very narrowly limited and must,*  
 13 *wherever possible, be exercised to preserve jury trial.*” *Id.* (emphasis added).

14       *Parklane* involved three distinct parties: the shareholders, Parklane, and the SEC.  
 15 *Beacon Theatres* involved the same two parties with respect to both the legal and equitable  
 16 actions. Like *Beacon Theatres*, the present circumstances involve the same two parties,  
 17 Mr. Nagy and the United States, in both the injunction and the refund actions. Therefore,  
 18 there is no basis for granting the injunction action priority over the refund action based on  
 19 the identities of the parties and to the extent *Parklane* may suggest that a public action  
 20 takes precedence over a parallel private action, such a justification does not exist in the  
 21 present circumstances.

22       Furthermore, the United States’ conduct guaranteed that Mr. Nagy could not bring  
 23 an action at law against it until almost a year after the present case was initiated. The IRS  
 24 initiated the present injunction action by requesting the Attorney General to file suit.  
 25 United States’s First Amended Complaint (“Complaint”), Dkt. 57, ¶4. It then postponed  
 26 bringing the penalty assessments against Mr. Nagy for months until after he had answered

1 the Complaint and assented in good faith to this Court's jurisdiction. Mr. Nagy was then  
 2 forced to wait several more months while the IRS delayed acting on his requests for refund  
 3 in connection with the penalty assessments. From the time the Complaint was filed until  
 4 Mr. Nagy could file a claim at law for refund and abatement of the penalty assessments ten  
 5 months – almost a full year – passed. *See* Complaint of Robert J. Nagy, Exhibit 2. The  
 6 United States held all the procedural cards; it should not be reward for its procedural  
 7 gamesmanship by denying Mr. Nagy his constitutional right to a jury trial.

8 Another similarity between *Beacon Theatres* and the present situation is that the  
 9 petitioner in that case attempted to preserve its right to a jury trial prior to the resolution of  
 10 the equitable claim. *Beacon Theatres, Inc. v. Westover, supra*, 359 U.S. at 501. This is  
 11 unlike *Parklane* where the petitioner waited until after final adjudication of the equitable  
 12 claim before raising the issue of its Seventh Amendment right to a jury trial. *Parklane*  
 13 *Hosiery Co., Inc. v. Shore, supra*, 439 U.S. at 324. In *Dairy Queen*, another case where  
 14 the district court struck a demand for jury trial by ruling the entire action was purely  
 15 equitable or alternatively characterizing the legal claims as merely incidental, the petitioner  
 16 also sought to preserve its right to a jury trial. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469,  
 17 470 (1962). The Supreme Court held that the case involved legal claims. *Id.* at 476-77,  
 18 479. It also held that the Seventh Amendment could not be circumvented by  
 19 characterizing legal claims as “incidental” to equitable ones. *Id.* at 470-73. Both *Beacon*  
 20 *Theatres* and *Dairy Queen* involve situations where in the course of the proceedings the  
 21 parties took steps to preserve their Seventh Amendment right to jury trials. In the present  
 22 case as well, Mr. Nagy is attempting to preserve his right to a jury trial. Mr. Nagy has not  
 23 waited for the completion of the injunction action to raise the issue of the preservation of  
 24 his right to a jury trial, unlike the parties in *Parklane* and other cases cited by the United  
 25 States where the non-jury adjudication of an issue was already complete when each party  
 26

1 first raised an argument that it had been denied its right to a jury trial.<sup>1</sup>

2 The United States disingenuously argues that the Supreme Court in *Parklane*  
 3 addressed the precise issue before this Court and rejected the possibility of staying an  
 4 injunction action to preserve a party's right to a jury trial in a separate legal action. United  
 5 States' Response in Opposition ("Opposition"), Dkt. 98, at 5. The United States cites to  
 6 footnote twenty-four, which states that Parklane was not entitled to stay the SEC action  
 7 and that the Securities and Exchange Act provides for prompt enforcement by the SEC  
 8 without interference by parallel private actions. *Parklane Hosiery Co, Inc. v. Shore, supra*,  
 9 at 337, n. 24. In support of its assessment, the Supreme Court cites to 15 U.S.C. 78u(g).  
 10 *Id.* This Code section states that no action for equitable relief instituted by the SEC shall  
 11 be consolidated or coordinated with any other action not brought by the SEC,  
 12 notwithstanding the existence of common questions of fact, without the consent of the  
 13 SEC. 15 U.S.C. 78u(g). The United States has identified no comparable section of the  
 14 Internal Revenue Code ("IRC") that is applicable here. Furthermore, this issue was not  
 15 before the Court in *Parklane* and was apparently neither briefed nor argued. The lack of  
 16 full argument on and consideration of this issue leaves it undecided whether a statutory  
 17 restriction on consolidation and coordination precludes the possibility of staying an action  
 18 on constitutional grounds. Regardless, the lack of comparable IRC section makes this  
 19 statement inapplicable to the present situation. Furthermore, the present case does not  
 20 involve a "parallel private action." Unlike the SEC in *Parklane*, the United States is a  
 21 party to both the injunction and the refund actions and will participate in the resolution of  
 22 the common questions in the refund action as well. In the present case staying the  
 23 injunction action will not deprive the United States of its role in the litigation, unlike in  
 24 *Parklane* where staying the SEC action would have resulted in the common question being  
 25 determined in the private class action. Thus the fact that the United States is a party to  
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<sup>1</sup> See section B(2) below.

1 both actions is a relevant distinction between the present case and *Parklane* that makes the  
2 latter inapplicable to the former.

**B. *Beacon Theatres* Controls the Present Circumstances Regardless of the Existence of Two Distinct Actions**

The single similarity the United States points out between the instant matter and *Parklane* is that *Parklane* involved separate law suits and the present injunction and refund claims are also in separate actions. Opposition at 6. The United States argues that legal and equitable claims must be joined in one action for *Beacon Theatres* to apply. *Id.* The corollary is that where there are separate equitable and legal actions involving a common party, *Parklane* applies and that party's right to a jury trial cannot be violated if the equitable action is adjudicated first. Pursuant to *Lytle v. Household Manufacturing*, however, *Beacon Theatres* is not so limited and *Parklane* is not so broad. See section B(1) *infra*. Rather, *Beacon Theatres* may apply where equitable and legal claims are in separate actions if rigid application of *Parklane* would produce an anomalous and unfair result. *Id.* Further, other cases the United States cites (none of which are from the Ninth Circuit) do not support its argument that *Parklane* applies to the present circumstances.

1. *Beacon Theatres* controls under the present circumstances in order to prevent an anomalous and unfair result pursuant to *Lytle*

18        In *Lytle v. Household Manufacturing, Inc.* (“*Lytle*”) the Supreme Court addressed  
19 the question of whether *Beacon Theatres* or *Parklane* applies to a situation where an action  
20 involved both legal and equitable claims, but the legal claims were dismissed and the  
21 equitable claims were thereafter decided by the court. 494 U.S. 545, 547-49 (1990). The  
22 Court of Appeals noted that the dismissal of the legal claims was erroneous, but  
23 nonetheless ruled that the plaintiff was collaterally estopped from relitigating those issues.  
24 *Id.* at 549. Before the Supreme Court, the defendant argued that *Parklane* applies because  
25 the district court decided the common issues when there were no legal claims pending and

1 if the erroneously dismissed legal claims were reinstated, at that point they would  
 2 constitute a separate action. *Id.* at 551. The Supreme Court rejects the argument that  
 3 *Parklane* should apply to this case, but it does not base its holding on the fact that the legal  
 4 and equitable claims were once joined. *Id.* at 551-52. It apparently does not even dispute  
 5 that reinstating the legal claims, without vacating the district court's decision as to the  
 6 equitable claims, would constitute a separate action. *See id.* Rather, the Court reasons that  
 7 it would be "anomalous" to prohibit a court from denying a party its right to a jury trial by  
 8 deciding an equitable claim before a legal claim and then applying collateral estoppel to  
 9 the legal claim, but to allow a denial of that right by erroneously dismissing all legal  
 10 claims and then deciding the equitable claims. *Id.* at 552. The Court further notes that in  
 11 the case before it such a result would be "particularly unfair" insofar as the plaintiff could  
 12 not have brought suit for his legal claims prior to the equitable claims because he was  
 13 required to join them in the same action. *Id.* Based on the anomalous and unfair result that  
 14 would obtain if *Parklane* applied, the Court declines to extend *Parklane* and finds that  
 15 *Beacon Theatres* controls. *Id.* at 552, 555.

16 *Lytle* demonstrates that *Beacon Theatres* is not narrowly limited to situations in  
 17 which equitable and legal claims are contemporaneously joined in one action. It also  
 18 demonstrates that *Parklane* does not rigidly apply to all situations in which legal and  
 19 equitable claims between the same parties are in distinct actions. Rather, *Beacon Theatres*  
 20 controls where the parties are the same and rigid application of *Parklane* would result in  
 21 unfairness insofar as the party with a legal claim was unable to bring it prior to the  
 22 equitable claim. As in *Lytle*, in the instant case the parties to the equitable and legal claims  
 23 are identical. Also as in *Lytle*, here Mr. Nagy was unable to bring his legal claim against  
 24 the United States prior to its equitable claim against him. United States forced Mr. Nagy  
 25 to wait ten months after it filed its Complaint before he could file his claims for refund. It  
 26 would be "particularly unfair" to Mr. Nagy to deprive him of his right to a jury trial when

1 the United States caused the legal claims to be filed after the equitable claims. See  
2 Declaration of Robert J. Nagy, Exhibit 1, ¶¶4-6, 16; Complaint of Robert J. Nagy, Exhibit  
3 2. Furthermore, whereas the result in *Lytle* would have been anomalous if *Parklane* had  
4 applied, so too it would be anomalous to permit the United States to circumvent Mr.  
5 Nagy's Seventh Amendment right to a jury trial simply by first filing an injunction action  
6 and then postponing penalty assessments for the identical conduct so as to prevent Mr.  
7 Nagy from filing a legal claim against the United States. The Supreme Court in *Lytle*  
8 declined to extend *Parklane* where the result would be unfair and anomalous. The Court  
9 in this case must also decline to extend *Parklane* and instead must find that *Beacon*  
10 *Theatres* controls.

## 2. Other cases cited by the United States do not support the application of *Parklane* to the circumstances of the present case

The United States cites *Ross v. Bernard* to support its argument that *Beacon Theatres* only applies where legal and equitable claims are joined in the same action and that *Parklane* applies otherwise. 396 U.S. 531 (1970). That was not the issue before the Court, however. Rather, *Ross* only holds that there is a right to a jury trial in a shareholder derivative suit if the corporation suing in its own right would have been entitled to a jury trial. *Id.* at 532-33, 542. This holding, moreover, does not depend in any way on the proposition that *Beacon Theatres* applies only to joined legal and equitable claims.

The United States also cites *Benjamin v. Traffic Executive Association Eastern Railroads*. 869 F.2d 107 (2<sup>nd</sup> Cir. 1989). That case takes place under the Staggers Act and involves the issue of whether the plaintiffs were rate bureau employees. *Id.* at 109, 115. The court rules that the plaintiffs' cause of action is purely statutory and, pursuant to the statute, the issue of whether they qualify as rate bureau employees is to be determined by an arbitration board. *Id.* As such, this is not a cause of action as to which the plaintiffs have a Seventh Amendment right to a jury trial. *Id.* at 116. *Benjamin* is therefore wholly

1 inapplicable to the instant matter. Whereas in *Benjamin* the plaintiffs *never* had a right to a  
 2 jury trial, it is undisputed that Mr. Nagy has a right to a jury trial with respect to his claims  
 3 for refund. The United States admits as much: “There is no question that if Nagy’s legal  
 4 claim for a refund was joined in the same action as the government’s equitable claim for  
 5 injunction, this Court would be obligated to provide a jury trial on all common issues  
 6 between the legal and equitable claims.” Opposition at 7.

7 The United States also cites *Temple of the Lost Sheep, Inc. v. Abrams*, in which the  
 8 court summarily cites to *Parklane* to support its conclusion that collateral estoppel does  
 9 not violate the appellant’s Seventh Amendment right. 930 F.2d 178, 185 (2<sup>nd</sup> cir. 1991).  
 10 In reaching this conclusion the court does not rely on the fact that there were two separate  
 11 cases. *See id.* Rather, the court emphasizes that, not only did the appellant not take any  
 12 steps to preserve its right to a jury trial in the federal proceedings it initiated, but in  
 13 proceedings before a state court judge it affirmatively raised and tried issues common to  
 14 the federal proceedings. *Id.* at 184-85. In essence the court says the appellant waived its  
 15 right to a jury trial on those issues. *See id.* The court bolsters this conclusion with  
 16 reference to a New York state law that a party will be prevented from relitigating an issue  
 17 before a jury if it affirmatively sought a prior ruling on that issue in a non-jury tribunal. *Id.*  
 18 at 185. Unlike the appellant in *Temple of the Lost Sheep*, Mr. Nagy has not waived his  
 19 right to a jury trial and is taking steps to preserve his right to a jury trial on the issues  
 20 common to the injunction and refund actions. As such, the instant case is distinguishable.

21 The final case the United States cites is *Perkins v. Spivey*. 911 F.2d 22 (8<sup>th</sup> Cir.  
 22 1990). *Perkins* involves two actions between one plaintiff (Perkins) and two different  
 23 defendants (General Motors and Spivey), but no common claims between defendants. *Id.*  
 24 at 26-27, 35. The claims against GM were tried first at a bench trial resulting in favor of  
 25 GM. *Id.* at 25. In the subsequent action against Spivey summary judgment was granted in  
 26 his favor on the basis that Perkins was collaterally estopped from relitigating common

1 issues determined adversely to her in the GM action. *Id.* at 26. During the pendency of  
 2 both actions Perkins did not take steps to protect her right to a jury trial in the action  
 3 against Spivey. *See id.* at 34-35. Perkins did try to join the claims against Spivey with  
 4 those against GM, but she waited eighteen months after filing to attempt joinder and,  
 5 moreover, she admitted this was motivated by a last minute change in strategy, not to  
 6 protect her Seventh Amendment right. *Id.* at 34. Additionally, joinder was denied by the  
 7 trial court because the resulting delay would unduly prejudice both defendants and because  
 8 there would probably have to be two separate trials in any event as there were no claims  
 9 common to both defendants and two trials would be necessary to avoid prejudice and  
 10 confusion. *Id.* at 35. Based on these circumstances the court applied *Parklane* and held  
 11 that Perkin's right to a jury trial was not violated by application of collateral estoppel. *Id.*

12       Unlike Perkins, Mr. Nagy did not bring three lawsuits involving two different  
 13 defendants. The injunction and refund actions involve identical parties. Both actions were  
 14 instigated by the IRS, moreover. Also unlike Perkins, Mr. Nagy is acting presently to  
 15 preserve his right to a jury trial and he brought this Motion as soon as possible after he  
 16 filed the refund litigation in South Carolina. The only similarity between *Perkins* and the  
 17 instant matter is that they both involve separate equitable and legal actions. As we have  
 18 seen above, however, this alone is insufficient to warrant application of *Parklane* over  
 19 application of *Beacon Theatres* to the present circumstances.

20 **III. THERE ARE NO COUNTERVAILING EQUITIES THAT OUTWEIGH MR.  
 21 NAGY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL**

22       If in this case trying the legal claims to a jury before trying the equitable claims to  
 23 the Court will irreparably harm the United States, the Court must use its discretion to  
 24 determine which claims should be tried first. *Beacon Theatres, Inc. v. Westover, supra*,  
 25 359 U.S. at 510. The discretion of the court here, however, is "very narrowly limited and  
 26 must, wherever possible, be exercised to preserve jury trial." *Id.* In this case there is no

1 principled reason for denying Mr. Nagy his Seventh Amendment right to a jury trial.

2       **A. *Katchen v. Landy* Is Inapposite to the Present Circumstances**

3       The United States attempts compare the present matter to *Katchen v. Landy*  
 4 ("Katchen") to argue that the mere presence of a Congressional scheme suffices to  
 5 overcome a litigant's Seventh Amendment right. Opposition at 9-10. Obviously the mere  
 6 fact that Congress passed a law does not make the law or its application in a particular  
 7 instance constitutional. Regardless, *Katchen* is inapplicable to this case.

8       *Katchen* involved bankruptcy proceedings in which a creditor filed a claim against  
 9 the bankrupt and the bankruptcy trustee objected to the claim and sought from the creditor  
 10 surrender of voidable preferences. 382 U.S. 323, 325 (1966). The court ruled in favor of  
 11 the trustee and ordered the preferences surrendered. *Id.* The creditor argued the court  
 12 violated his right to a jury trial on the issue of the preferences because to recover the  
 13 preferences the trustee would typically have to file a plenary action in which there is a  
 14 right to a jury trial. *Id.* at 328. In rejecting this argument, the Court notes that by making a  
 15 claim, the creditor subjected himself to all the consequences that attach to an appearance,  
 16 including adjudication of the preferences issue. *Id.* at 335-36. Furthermore, bankruptcy  
 17 proceedings convert legal claims into equitable claims. *Id.* at 336. Thus converted, there  
 18 simply is no right to a jury determination of the issue. *Id.* at 337. In *Katchen* there simply  
 19 was no legal claim after the creditor made his claim against the bankrupt.

20       The creditor also argued that the mere possibility there could have been a legal  
 21 claim, insofar as the preferences issue could have been tried in a plenary action, implicates  
 22 his Seventh Amendment right. *Id.* at 338. He argues that this possibility should require  
 23 the bankruptcy court to stay its proceedings and direct the trustee to commence a plenary  
 24 suit so as to preserve the creditor's right to a jury trial. *Id.* The Court also rejects this  
 25 argument, finding that it is beyond the purview of the Seventh Amendment to require an  
 26

1 equity court to order the commencement of a proceeding not initiated by the parties. *Id.* at  
 2 339. It notes that *Beacon Theatres* does not require a court to order a new, legal action be  
 3 commenced so that an issue common to an equity action may be tried to a jury. *Id.* As  
 4 shown above, *Beacon Theatres* applies where both legal and equitable claims actually  
 5 exist. The rule suggested by the creditor would require a court to *create* a legal claim any  
 6 time the mere *possibility* exists. The Court rules that this finds no support in the Seventh  
 7 Amendment, *Beacon Theatres*, or the Bankruptcy Act. *Id.*

8 The instant matter does not involve a bankruptcy proceeding. There is no  
 9 conversion of legal claims into equitable claims. As the United States admits, moreover,  
 10 Mr. Nagy has an actual legal claim against it in his refund action. Opposition at 7. Unlike  
 11 the creditor in *Katchen*, Mr. Nagy does not argue that this court should order the creation  
 12 of a legal claim not otherwise instituted by one of the parties. Rather, Mr. Nagy argues  
 13 that he already has a legal claim in a separate action that he was forced by the conduct of  
 14 the United States to bring almost a year after it filed the injunction action and that based on  
 15 this the Court should stay the proceedings so that issues common to both actions may be  
 16 resolved by a jury in the refund action thereby preserving his Seventh Amendment right.  
 17 *Katchen* provides no guidance as to this argument and, therefore, is inapposite here.

18 **B. The United States Has Not Shown Irreparable Harm and Also Confuses the**  
 19 **Relevance of Irreparable Harm under *Beacon Theatres* with the Standard**  
 20 **for Granting a Stay**

21 The United States claims that it will suffer irreparable harm if the proceedings are  
 22 stayed. *Id.* at 11. This is merely an allegation, however, that is not buttressed by any  
 23 evidence or declaration or offer of proof. *See id.* The Court should not countenance naked  
 24 allegations. Additionally, the harm alleged consists of monetary losses and “diminished  
 25 confidence in the Internal Revenue System.” *Id.* Notwithstanding that no irreparable  
 26 harm has been established, the United States may recover monetary losses through

1 taxpayer audits and penalty assessments, which it in fact has already attempted against Mr.  
 2 Nagy. It is doubtful, moreover, that diminished confidence is a cognizable harm.

3 Furthermore, for purposes of Seventh Amendment analysis, irreparable harm to the  
 4 party seeking equitable relief is only relevant insofar as it requires the court to use its “very  
 5 narrowly limited” discretion to decide whether the equitable or legal claim should be  
 6 decided first. *Beacon Theatres, Inc. v. Westover, supra*, 359 U.S. at 510. Even a showing  
 7 of irreparable harm, therefore, does not by itself defeat a party’s right to a jury trial. *Id.*  
 8 Contrary to the United States’ argument (Opposition at 11-12), under *Beacon Theatres* a  
 9 showing of irreparable harm is the beginning of the analysis of which claim should be tried  
 10 first, not the conclusion. *Id.*

11 In determining whether a stay should be granted, the Court must weigh the harm  
 12 that may result from a stay against the hardship and inequity that may result from denial of  
 13 a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9<sup>th</sup> Cir. 1962). In other words, the  
 14 irreparable harm the United States alleges it will suffer must be weighed against the  
 15 hardship and inequity Mr. Nagy will suffer if deprived of his Seventh Amendment right to  
 16 a jury trial. The United States does not argue that irreparable harm to it outweighs the  
 17 hardship and inequity Mr. Nagy will suffer; nor does it cite to any authority for such a  
 18 conclusion. *See* Opposition at 11-12. Rather, it argues that “if” it can demonstrate  
 19 irreparable harm, then denying Mr. Nagy a jury trial is not a violation of the Seventh  
 20 Amendment. *Id.* at 12. A showing of irreparable harm in the Seventh Amendment context  
 21 only requires the court to use its discretion in deciding whether a legal or an equitable  
 22 claim must be tried first, however. *Beacon Theatres, Inc. v. Westover, supra*, 359 U.S. at  
 23 510. In the context of analyzing whether a stay should be granted, a showing of  
 24 irreparable must be weighed against the hardship and inequity that will be suffered if the  
 25 stay is not granted. *CMAX, Inc. v. Hall, supra*, 300 F.2d at 268. Again, this is something  
 26 the United States fails to do. *See* Opposition at 11-12.

1                   **C. There Are No Additional Hazards Created by Applying *Beacon Theatres* to**  
 2                   **the Present Case that Outweigh Mr. Nagy's Seventh Amendment Right**

3                   The United States argues that staying the proceedings will cause discovery and  
 4                   prosecution of the equitable claim to stop and that it will therefore be prejudiced. *Id.* at 12.  
 5                   Aside from merely restating what constitutes a stay, this is simply an alternate formulation  
 6                   of the argument that the United States will suffer harm if the proceedings are stayed. *See*  
 7                   *id.* But the United States yet again fails to weigh this alleged harm against the hardship  
 8                   and inequity Mr. Nagy will suffer if his Seventh Amendment right is curtailed. *CMAX,*  
 9                   *Inc. v. Hall, supra*, 300 F.2d at 268.

10                  The United States also argues that staying the proceedings pending resolution of the  
 11                  refund action is a perversion of this Court's power to grant a stay insofar as the stay would  
 12                  be dependent on proceedings in another court. Opposition at 13. In *CMAX, Inc. v. Hall*  
 13                  the Ninth Circuit Court of Appeals upheld a district court decision staying the proceedings  
 14                  before it pending resolution of an enforcement action before the Civil Aeronautics Board.  
 15                  *CMAX, Inc. v. Hall, supra*, 300 F.2d at 266-67. Pursuant to *CMAX*, therefore, staying  
 16                  proceedings pending the outcome of an action in another tribunal is permissible.  
 17                  Furthermore, this Court would retain control over the Order staying the proceedings and  
 18                  would be able to modify it as warranted by changing circumstances.

19                  **IV. THIS COURT HAS THE AUTHORITY PURSUANT TO F.R.C.P. 21 TO**  
 20                  **SEVER ALL CLAIMS AGAINST MR. NAGY AND TO TRANSFER THOSE**  
 21                  **CLAIMS TO THE DISTRICT OF SOUTH CAROLINA PURSUANT TO 28**  
 22                  **U.S.C. 1404(a)**

23                  Pursuant to Federal Rule of Civil Procedure ("FRCP") 21, the Court may "sever any  
 24                  claim against a party." The statutory language is plain and broad on its face without any  
 25                  inherent limitations. Although courts in other Circuits may have read additional conditions  
 26                  into their ability to sever claims to effectuate transfer, no court in the Ninth Circuit has  
 27                  done so. This Court's ability to sever claims is thus unconstrained by precedent.

1 Furthermore, this case raises the issue of Mr. Nagy's Seventh Amendment right to a  
 2 jury trial. This constitutional concern changes the calculus from the prior Motion to Sever  
 3 and Transfer Venue. The United States admits that insofar as Mr. Nagy's Seventh  
 4 Amendment right to a jury trial is implicated by the parallel proceedings of equitable and  
 5 legal claims, and a stay is necessary to preserve that right, then severance and transfer of  
 6 all claims against Mr. Nagy may be proper. Opposition at 14. Paragraph three of the  
 7 Court's prior Order Denying Motions to Sever and Transfer, moreover, also suggests that  
 8 it would be proper to sever all claims and transfer them to South Carolina in lieu of staying  
 9 the proceedings now that Mr. Nagy has filed his refund action and his Seventh  
 10 Amendment right to a jury trial is implicated. Severing all claims against Mr. Nagy and  
 11 transferring them to South Carolina will accomplish the dual goals of preserving Mr.  
 12 Nagy's Seventh Amendment right and allaying the United States' fears about harm it will  
 13 suffer if the proceedings are stayed.

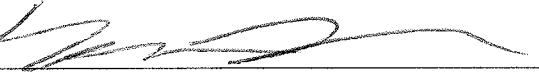
14 **V. CONCLUSION**

15 For the foregoing reasons this Motion must be granted to preserve Mr. Nagy's  
 16 Seventh Amendment right to a jury trial.

17 DATED: August 27, 2008

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